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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

18-cr-693 (RMB)

5 RICHARD GAFFEY, et al.,

6 Defendants.

Hearing

7 -----x

8 New York, N.Y.
9 January 24, 2019
12:00 p.m.

10 Before:

11 HON. RICHARD M. BERMAN

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 United States Attorney for the
16 Southern District of New York

17 BY: NATHAN REHN, ESQ.

MICHAEL PARKER, ESQ.

SARAH PAUL, ESQ.

18 Assistant United States Attorneys

19 HOGAN LOVELLS LLP

Attorneys for Defendant Gaffey

20 BY: ROBERT BUEHLER, ESQ.

21 Also Present: Lea Harmon

22 U.S. Pretrial Services Officer

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1 THE COURT: I gather that Mr. Gaffey is unavailable
2 today. Is that correct?

3 MR. BUEHLER: Yes, your Honor. As I have mentioned to
4 the government and explained to your clerk -- and by the way,
5 Robert Buehler for Mr. Gaffey, your Honor. Good afternoon.

6 Mr. Gaffey was on the 8 a.m. flight from Logan Airport
7 to LaGuardia. It would have gotten him here with over two
8 hours to spare. They got on the plane. They pulled out. They
9 waited for 30 minutes and then another 45 minutes, and then
10 after two hours they went back to the terminal, and because of
11 the weather he was unable to make it here. But he was fully
12 intending to do that.

13 I have spoken to him. He consents to this proceeding
14 occurring without him being present, of course assuming your
15 Honor agrees. However, just to let your Honor know -- and of
16 course it is in the Court's discretion if this is possible --
17 but I do have Mr. Gaffey's number where he can be reached and
18 he would be able to listen in at least to the argument, if
19 that's something that the Court was amenable to.

20 THE COURT: Let me understand, this is essentially a
21 review of the bail conditions in this case. Right? A de novo
22 review, I guess you would call it. The magistrate judge here
23 limited travel, restricted travel, and consequently now the
24 application is for two overseas or out-of-the-country trips in
25 February and March. And there's a written application by

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1 defense counsel, which is opposed by the government. So I'm
2 happy to hear. And pretrial, who is here, I think, takes no
3 position? Is that correct?

4 MS. HARMON: That's correct, your Honor.

5 THE COURT: So I'm happy to hear you out. It's your
6 application, I guess.

7 MR. BUEHLER: Right. OK. Well, I appreciate that,
8 your Honor. And your Honor's summary of the procedural posture
9 is correct. Mr. Gaffey has two trips, both of which were
10 planned before he was arrested on the charges in the
11 indictment, and both of which are prepaid, so there would be a
12 financial hardship to Mr. Gaffey if he was unable to take these
13 trips. But the important point is, he didn't plan them after
14 his arrest; they were all planned some time before that.

15 I'd like to just kind of start with the basics, your
16 Honor, and go back to first principles here. In any kind of a
17 bail hearing, whether it's to set bail or modify bail, the real
18 key issue is a defendant's personal characteristics and his
19 ties to the community. And here, your Honor --

20 THE COURT: Risk of flight.

21 MR. BUEHLER: Yes, it is risk of flight. That's a
22 hundred percent correct. And so his personal characteristics
23 and ties to the community would be the most important aspects
24 to evaluate his level of flight risk, if any.

25 We strongly posit to your Honor that Mr. Gaffey poses

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1 absolutely no flight risk whatsoever. This was recognized by
2 both of the magistrate judges before whom he was presented,
3 once in Boston and again here in the Southern District, neither
4 of whom set any bond for Mr. Gaffey and instead released him on
5 his own recognizance.

6 THE COURT: But they did restrict, to be sure, the
7 travel.

8 MR. BUEHLER: They did, your Honor, which is more or
9 less a customary, standard condition of pretrial release in
10 this district. But we would argue, your Honor, that, in the
11 context of this request, which is simply to have him have his
12 passport returned for the two week-long trips that we're
13 talking about, Mr. Gaffey simply does not pose a risk of
14 flight.

15 And so I just would like to go through that, your
16 Honor. I do feel that when you hear this, you would agree
17 that --

18 THE COURT: I read your letter. I know what's in
19 there.

20 MR. BUEHLER: OK, great.

21 THE COURT: I did not read the transcript of the
22 magistrate judge's proceeding. Did you all discuss risk of
23 flight there?

24 MR. BUEHLER: Well, your Honor, what occurred before
25 Judge Freeman is that the government requested that a bond be

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1 set. The defense opposed that request. And Judge Freeman
2 agreed with the defense and did not require Mr. Gaffey to post
3 a bond of any kind. She instead released him, again, on his
4 own recognizance.

5 Her reasoning was very straightforward, your Honor,
6 which was, it just wasn't necessary after hearing from the
7 parties. And I think the points made were pretty similar to
8 what have been made in both sides' submissions here. She
9 determined that no bond was necessary, and he was simply
10 released on his own recognizance.

11 So just as you see in our letter, your Honor, he does
12 have extraordinarily strong ties to our community, and it
13 really is the Greater Boston area.

14 He's 74 years old. He was born in the United States,
15 in one of the suburbs of Boston. He has spent his entire life
16 really within a 50- or 60-mile radius of where he was born. He
17 grew up in Watertown, Massachusetts. He went to school at
18 Northeastern University, which is in Boston. After he
19 graduated, from 1968 to 1978, he worked for Arthur Andersen,
20 which at the time was one of the Big Eight accounting firms.
21 But while Andersen was a national firm, he worked only in the
22 Boston office for ten years.

23 He left Arthur Andersen in 1978, along with another
24 individual, and founded his own accounting firm, that was based
25 also within the Greater Boston area. He was there for eight

1 years.

2 In 1986 he parted ways with his first partner, merged
3 his firm with two other partners, to form the firm called Elder
4 Gaffey & Paine, which is where he has worked for the last 32
5 years, since 1986 to the present. That is based in
6 Marlborough, Massachusetts. So his entire work life, your
7 Honor, has been there --

8 THE COURT: Yes. I've got it.

9 MR. BUEHLER: -- all of his family. He has a wife of
10 50 years. Indeed one of the purposes of their trip to Mexico
11 is to celebrate their 50th wedding anniversary. She's also
12 from Watertown, Massachusetts. That is where they met.
13 They've lived together in the Boston area for 50 years. They
14 currently live in Medfield now, in the same house that they
15 have owned for the last 32 years.

16 THE COURT: So he has a house in Massachusetts. He
17 has another house, I forget if it's a weekend house or summer
18 house, in Martha's Vineyard or --

19 MR. BUEHLER: That's correct, your Honor.

20 And that's his only real property that he owns, your
21 Honor, both of which are properties in Massachusetts.

22 Just for the sake of completeness, he has four living
23 siblings. He's the oldest of six. One of his brothers passed
24 away, but his four remaining siblings all live in the same area
25 where they grew up, which is in the Greater Boston area. They

1 do actually own cottages in the same area, Oak Bluffs,
2 Massachusetts, because they vacation together. They are a very
3 close family. Mr. Gaffey has the two adult children, three
4 grandchildren, numerous nieces and nephews, grandnieces and
5 nephews, all of whom also really all live in this same area,
6 none even outside Massachusetts, much less outside the United
7 States.

8 And as we also noted, which is important, he doesn't
9 have any assets outside the country. They're really all,
10 again, in Massachusetts or in accounts with U.S. firms within
11 the United States.

12 As you know, your Honor, the allegations in the
13 indictment are very wide ranging, all sorts of international
14 finance and transactions and things like that. But despite all
15 that, the government concedes that Mr. Gaffey doesn't have
16 assets himself outside of the United States. None of the
17 accounts are his. He has no money outside the U.S. And that's
18 the most important thing.

19 And this was recognized, your Honor, the fact that he
20 wasn't a flight risk, by the two magistrates.

21 You know, the government notes, in their letter they
22 state that, you know, the current set of bail conditions give
23 the defendant little incentive to return to the U.S. to face
24 charges. But we would submit, your Honor, the government
25 totally misses the mark when they make that point. The fact

1 is, the magistrate judge has determined he has a lot of
2 incentive to return to and stay in the United States. And
3 those are his ties to the community. Family --

4 THE COURT: You keep saying that, but they also said
5 he couldn't take these trips, in so many words, right? So you
6 can't have it both ways. Perhaps if he had said to the
7 magistrate judge that he wants to go to the Cayman Islands and
8 Mexico, he might have said, well, you have to put up security
9 or something like that.

10 MR. BUEHLER: Your Honor, I will just say they weren't
11 faced with that issue.

12 THE COURT: Right. This is de novo review. But I'm
13 just saying that if you're going to use the magistrate's
14 conclusions, you have to put it in the context in which the
15 magistrate decided.

16 MR. BUEHLER: Understood, your Honor. And I
17 understand what you're saying. And the main point that I am
18 submitting to your Honor is just, again --

19 THE COURT: I know.

20 MR. BUEHLER: -- they understood the ties to the
21 community.

22 THE COURT: I appreciate that.

23 MR. BUEHLER: I'd also like to just comment on a
24 handful of the points that the government made in their letter.

25 THE COURT: There are two that stand out to me. One

1 is that the government contends that Mr. Gaffey's company,
2 partners, whatever, were not forthcoming with respect to
3 subpoenas and supplying information.

4 By the way, I know you recognize, Mr. Gaffey is not
5 here, so I hope you'll tell him that whatever we say here today
6 has no bearing on his guilt or innocence and nothing we say
7 should be taken in any way as disparaging him or predetermining
8 what's going to happen in this case.

9 That's what I read, number one. They seem to say
10 that. They also seem to say that -- I'm not sure I've got this
11 right -- but they seem to say that he had some control over
12 assets that are outside of the United States. So those are the
13 two. If there are more, I'm happy to hear about those. But
14 those are the two that jump out.

15 MR. BUEHLER: OK. Well, I will address that, your
16 Honor. And I appreciate you directing us to those issues.

17 In general terms, I think the context of what happened
18 here is, we indicated in our letter that Mr. Gaffey and his
19 firm cooperated in the investigation and specifically complied
20 with the subpoenas. And I think, writ large, the government
21 takes issue with that point. And we take issue, in turn, with
22 the government's disagreement with us.

23 So first of all, we would note, in terms of just
24 cooperation in general, Elder Gaffey & Paine, the accounting
25 firm, produced over 185,000 pages of documents to the

1 government. The government in fact just produced to the
2 defense last week its first set of discovery. It's about
3 800,000 pages. The materials from Elder Gaffey & Paine made up
4 almost 25 percent of the government's discovery to us. So
5 there was a significant amount of documentation that was
6 produced by the accounting firm.

7 They also produced a handful of privilege logs, your
8 Honor. So there clearly was compliance with the subpoenas. We
9 would call that cooperation with the subpoenas.

10 Then the government points to really three issues in
11 their letter that they somehow claim show a lack of compliance
12 or a lack of cooperation. One is they say -- and I think this
13 is what your Honor was alluding to -- that the accounting firm,
14 their production was deficient. And I think that was directed
15 to the first subpoena, which was issued in 2016. So I would
16 note a few things about that, your Honor. First of all, when
17 that subpoena was issued, it did not come with what is
18 frequently standard with subpoenas from the DOJ; it didn't have
19 a set of instructions that laid out -- and some of these can be
20 very, very detailed in terms of the specs, the specification
21 and the details about how the documents should be produced.
22 And so that didn't exist.

23 Second of all, Elder Gaffey & Paine is not a Big Four
24 accounting firm, your Honor. It doesn't get subpoenas like
25 this on a regular basis. That first subpoena in particular was

1 extremely broad, had at least a dozen different categories,
2 which were themselves very broad.

3 And so this was not something they were used to doing.
4 As a result of misunderstandings and technical issues, the
5 government notes that there were some attachments to some
6 e-mails that weren't produced. That was not purposeful. That
7 was a result of just not having done this before. Once this
8 was brought to the attention of the accounting firm, they
9 retained a formal e-discovery, electronic discovery vendor, who
10 then handled the productions from then on. And that did result
11 in voluminous -- search terms being used, the 185,000 pages of
12 documents, privilege logs, etc. And the government was in
13 touch with counsel in connection with that.

14 And indeed, your Honor, Elder Gaffey & Paine was
15 making productions to the government up through October of just
16 last year, just before the indictment was issued in this case.
17 And so we would argue, first of all, the productions weren't
18 deficient. And certainly that does not reflect on Mr. Gaffey's
19 risk of flight. It was really more an issue of learning how to
20 produce the documents, which they then did and they did fully.
21 Number one.

22 Number two, they note how two of Mr. Gaffey's partners
23 when they were interviewed by the government apparently said
24 they weren't familiar with the first subpoena. So there, your
25 Honor, is a very straightforward response. As soon as the

1 subpoenas were issued in this case, and maybe even before, but
2 once they were aware of the investigation, Mr. Gaffey retained
3 counsel, Elder Gaffey & Paine and the other partners retained
4 separate counsel. And Mr. Gaffey was instructed, as would be
5 customary in any case, not to discuss the investigation or any
6 issues in the investigation, with his partners. And that's
7 what happened here. So when the government says they were
8 never -- the other partners weren't informed by Mr. Gaffey of
9 the existence of the subpoena, that's fully understandable.
10 Mr. Gaffey wasn't to discuss these issues, at the instruction
11 of counsel, with his partners.

12 To the extent the partners knew or didn't know about
13 the subpoena, that would have been a result of whatever their
14 counsel, their separate counsel elected to share with them. I
15 can't comment on that. I don't know what they were told and
16 not told. But that is the explanation for why they weren't
17 aware.

18 And then finally, your Honor, to address the last
19 point which you raised, the government stated in its letter
20 that they believe that there were responsive documents to one
21 of the subpoenas. Specifically it was a subpoena, your Honor,
22 that asked for records of foreign bank accounts in which
23 Mr. Gaffey had a financial interest or over which he had
24 signature or other authority. That is a defined term, your
25 Honor. It's very clearly defined. It's a term of art that's

1 defined in the federal regulation. And there's a specific test
2 that's applied to whether or not somebody does have signature
3 or other authority over a foreign bank account. And counsel
4 was in touch -- this was a subpoena that was actually not
5 issued by the Southern District. It was issued by the Tax
6 Division of the Department of Justice. Counsel was in touch
7 with the lawyer at the Tax Division who issued the subpoena,
8 made it very clear that, under the terms of the definition that
9 is in the federal regulations for this particular term,
10 Mr. Gaffey did not possess such documents because he did not
11 have a financial interest in -- which I don't think the
12 government takes issue with -- nor signature or other authority
13 over any foreign bank accounts.

14 Now, I have not seen whatever evidence the government
15 claims to have, so I can't address the specifics. But there is
16 a specific test, which I can discuss with your Honor, and
17 Mr. Gaffey did not satisfy that test. There were no such
18 accounts.

19 THE COURT: All right. Shall we hear from them?

20 MR. BUEHLER: Of course. Thank you, your Honor.

21 MR. REHN: Thank you, your Honor. Thane Rehn
22 appearing for the United States. And I am joined today by
23 Michael Parker, who is with the Money Laundering and Asset
24 Recovery Section at the Department of Justice, and by Sarah
25 Paul, who is also with the United States Attorney's Office.

1 A couple of points, your Honor. As the Court is
2 aware, there are a number of factors set forth in the statute.

3 THE COURT: You oppose these trips?

4 MR. REHN: We very much do, as laid out in our letter.
5 I think there are a few points that would explain the reasons
6 why, under the statutory factors and applied to the facts of
7 this case. It would be that there's a risk of flight that
8 there's no way to address while permitting the defendant to
9 engage international travel while in possession of his
10 passport.

11 I will respond to the sentence points, but I would
12 just like to lay out a few high-level issues in terms of what
13 we think the Court should be particularly focused on in making
14 this decision.

15 The first factor laid forth in the statute that I
16 think is important is just the strength of the government's
17 case against the defendant and the nature and circumstances of
18 the defense. And I think it's important to recognize that this
19 case comes before the Court with an unusually strong wealth of
20 evidence and information for the Court to consider, in the form
21 of the more-than-60-page indictment that lays out in detail all
22 of the abundant evidence that the grand jury considered in
23 returning the charges against Mr. Gaffey.

24 And particular there is witness testimony. There are
25 bank records. There are fraudulent filings that the defendant

1 himself submitted to the IRS that all show that the defendant
2 was a key participant in a sophisticated international scheme
3 to defraud the United States government of tax revenues.

4 And this isn't the sort of case where the Court has to
5 take barebones allegations that are in an indictment or even a
6 proffer from the United States Attorney's Office in assessing
7 the strength of the case. This is a case where there's a
8 wealth of evidence laid forth, including a number of e-mails
9 from the defendant himself showing his activity participation
10 in this fraud.

11 And when you look at the nature and circumstances of
12 the offense, another important thing to keep in mind is the
13 seriousness of this offense. Obviously there are two different
14 components of that. One component of the seriousness of the
15 offense is just the high-profile nature of the offense, as the
16 Court is well aware. This is a significant widespread fraud
17 that has attracted a large amount of attention, and the
18 defendant was a major player in that.

19 But more specifically, the second component of this,
20 in terms of looking specifically at this defendant, there's
21 real criminal exposure here. We aren't far along enough in the
22 case at this point to have a final position in terms of what
23 the sentencing guidelines would be, but just conservatively
24 based on our initial estimations, we think that, given the
25 nature of the loss involved here that the defendant is directly

1 connected to, which we think conservatively is in excess of \$3
2 1/2 million, and combined with some of the other enhancements
3 that would apply in the sentencing guidelines, we think likely
4 the offense level here is at an, again, initial ballpark
5 conservative estimate, in the range of 27, which would result
6 in the defendant's exposure to a substantial term of
7 imprisonment. It gives him a very strong incentive to not stay
8 around in the United States and await that term of
9 imprisonment, which, given the strength of the case, is
10 extremely likely to occur.

11 And so while it's true that the defendant has a
12 lifelong connection to the United States and specifically to
13 the Boston area, there's been a big change, and the defendant
14 now has been confronted with the wealth of the government's
15 evidence against him and it does give him an incentive to flee,
16 one that is one addressed by any other bail conditions in this
17 case. The one thing the magistrate judge has put in place was,
18 surrender your passport, no international travel, because at
19 that point there is just nothing holding him back.

20 Now, what the defense says in relation to that is,
21 well, he's got property here, he has family here, you know, all
22 of his assets are in the United States. But there are a couple
23 of problems with that, your Honor. Most importantly, this
24 defendant, as alleged in the indictment, is a leading expert in
25 moving assets in and out of the United States in a manner

1 designed to conceal them from the United States government. He
2 was highly compensated for that. That was his role in this
3 scheme. He provided advice to multiple clients, as set forth
4 in the indictment, as to how to do that. And so the defendant
5 certainly has the ability and the experience to support himself
6 in a foreign country, whether or not he has currently has
7 assets located there. He spent a large portion of his recent
8 career at least advising people on exactly how to do that.

9 So there is nothing about the fact that his assets are
10 primarily located in the United States that necessarily would
11 prevent him from establishing a new lifestyle everywhere.

12 And while we haven't been able to confirm, prior to
13 today's hearing, with OIA whether we would be able to obtain
14 extradition from the Cayman Islands or Mexico, what we do know
15 is that we would face some substantial obstacles with respect
16 to each of those governments. But we certainly know that those
17 two locations are in close proximity to multiple other
18 jurisdictions where extradition would be essentially
19 impossible. And there would be, again, nothing preventing the
20 defendant from removing himself to one of those jurisdictions
21 if he's permitted to travel. So we think that there is a real
22 risk of flight and there's nothing preventing the defendant
23 from engaging in that, no real security.

24 The next thing I just want to get into a little bit is
25 this issue with the cooperation of the investigation, because I

1 think the picture that's been put forward by defense counsel
2 doesn't give the Court a fully accurate picture. We've
3 provided somewhat of a thumbnail sketch in our written
4 submission. But I think the full timeline would help the Court
5 in understanding just the degree to which the defendant really
6 did not comply with this investigation and really attempted to
7 prevent the government from obtaining records in response to
8 the various forms of process.

9 The first thing that happened in terms of attempting
10 to get records from the defendant was a subpoena addressed to
11 him in his individual capacity. After receiving that subpoena,
12 his lawyer advised the government that the subpoena should
13 instead be addressed to the accounting firm, Elder Gaffey &
14 Paine. The government generated a new subpoena addressing the
15 accounting firm, but, importantly, served that subpoena on the
16 defendant, which was what his lawyer had requested, on his
17 attorney. So his attorney was in receipt of a subpoena that,
18 at the attorney's request, was addressed to the firm.

19 Now, essentially, no documents were produced, for an
20 extended period of time. And eventually the government begins
21 making inquiries of the accounting firm and talking to the
22 other partners, and discovers that the defendant and his
23 counsel had never even provided the firm with that subpoena.
24 They didn't know they had been subpoenaed. So the defendant
25 was essentially preventing the government from obtaining the

1 business records of that firm that were clearly responsive to
2 the subpoena. I mean, the defense certainly now admits that
3 there were responsive records to the subpoena because, as the
4 defense has just told you, hundreds of thousands of pages were
5 eventually produced. Those could have been produced much
6 sooner if the defendant had actually not attempted to bury that
7 subpoena but had actually shared it with the firm, which was
8 what was certainly the expectation of the government when it
9 reissued that subpoena and addressed it to the firm.

10 But another point to make in terms of the timeline is
11 that, in response to that initial subpoena, the accounting firm
12 and the defendant only produced essentially a few hundred pages
13 of documents in response to that first subpoena. Again, this
14 is somewhat based on the government's counsel's recollection;
15 the numbers may be a little bit off. But it's in that
16 neighborhood, is our recollection. And just from the face of
17 that production, it was clear it was deficient. For example,
18 e-mails were produced without the attachments, containing
19 things like bank records and accounting records.

20 THE COURT: You said that in your letter.

21 MR. REHN: Yes. So, again, there were multiple
22 requests from the government to defense counsel to remedy this
23 situation and essentially a flat refusal from the defendant to
24 engage in good faith with the process that had been issued.

25 So the government issued another grand jury subpoena.

1 This one again was to the defendant individually, requesting
2 information about these bank accounts.

3 Now, the defense makes this technical argument. We
4 allege in the indictment the defendant had authority over these
5 bank accounts. We have other bank records indicating that; the
6 defendant had authority over these bank accounts. He was
7 certainly directing payments into and out of these overseas
8 bank accounts on behalf of a client of his. And we don't
9 believe that he produced records that were covered by the
10 subpoena. And, again, to the extent there was confusion about
11 this, the defense was not an open book in terms of
12 communicating with the government, again indicating perhaps an
13 attempt to conceal evidence of the defendant's crimes rather
14 than a good-faith attempt to cooperate.

15 So the government issued a third subpoena, this time
16 to the defendant's accounting firm, again trying to get
17 responsive records relating to this ongoing investigation. The
18 date for production expired. Nothing was produced. And at
19 that point, the government obtained a search warrant for the
20 accounting firm and executed that search warrant in the summer
21 of 2017, I believe. It was only after that search warrant was
22 executed and the government seized a large volume of records
23 from the accounting firm that all of a sudden compliance
24 started happening. And the vast majority of those 185,000
25 pages that the defense is referring to were only produced at a

1 point at which continued refusal to comply with the subpoena
2 was essentially futile, because it was clear that the
3 government had another means of obtaining those records and was
4 in the process of reviewing documents that it seized from the
5 accounting firm to identify the records pursuant to the search
6 warrant.

7 So any suggestion that the defendant was engaged in
8 some sort of good-faith effort at compliance we would submit is
9 just belied by the actual investigative record in this case.

10 And that's consistent with a larger pattern of
11 behavior on the part of the defendant, going back to, as
12 alleged in the indictment, the fraudulent filings he submitted
13 to the IRS, where he made misrepresentations about the true
14 nature of various bank accounts that were held by his clients
15 overseas with the purpose of concealing their assets from the
16 United States government.

17 So, given all of these factors and given that the
18 defendant would have no real reason to come back to the United
19 States and certainly would have the ability to maintain himself
20 in a location where extradition would be difficult or
21 impossible, we just don't think it would be appropriate to
22 allow international travel, which is a highly unusual request
23 in any case, but in particular in this case, given the nature
24 of the locations where the defendant is going and his personal
25 criminal history and personal history.

1 THE COURT: I've got it. Is there personal security
2 he could provide that would change your mind?

3 MR. REHN: We would submit that the nature of the
4 international travel is such that there isn't really a way to
5 assure his appearance in court. Obviously it would be somewhat
6 mitigated by certain forms of security, such as pledging the
7 real properties, but we don't believe that would fully address,
8 given the -- the defendant is a wealthy individual with a large
9 number of assets, and we're not certain that even something
10 like that would prevent him from being able to flee, especially
11 given the serious nature of the charges.

12 THE COURT: He has two co-defendants that I'm aware of
13 that are in the extradition process now from London and Paris
14 perhaps?

15 MR. REHN: That's correct, your Honor. The one who's
16 in Paris, there is a competing extradition request from
17 Germany. It appears there may be a chance that defendant will
18 ultimately not be extradited but will instead be extradited to
19 Germany to face charges there. We're still working with the
20 French authorities. We're trying to get a better picture of
21 what's going on in that case. But extradition requests have
22 been submitted to both the United Kingdom and France. With
23 respect to the defendant in the United Kingdom, we do expect
24 that he will be extradited at some point.

25 THE COURT: OK. I think I have enough.

1 Counsel, did you want a last word?

2 MR. BUEHLER: Well, yes, your Honor.

3 THE COURT: I think I do have enough information, but
4 I'm happy to hear you.

5 MR. BUEHLER: Well, I would like to be heard, your
6 Honor. I think the government threw a lot of stuff on the
7 wall, hoping some of it would stick.

8 First of all, your Honor, they start off with the
9 strength of the evidence and the nature and circumstances of
10 the charges. If it's not clear already --

11 THE COURT: I guess the part that mostly stuck had to
12 do with the response to the three subpoenas and the search.

13 MR. BUEHLER: All right. So if that's the case, your
14 Honor, then I would just note that the allegations in the
15 indictment are exactly that. They are just allegations.

16 THE COURT: Sure.

17 MR. BUEHLER: We would strongly, and do strongly
18 dispute them, and Mr. Gaffey has pled not guilty and is going
19 to maintain that position up to and including trial.

20 THE COURT: And he is not guilty until such time as he
21 were found to be guilty.

22 MR. BUEHLER: That is correct, your Honor.

23 THE COURT: We get all that.

24 MR. BUEHLER: I just wanted to make that clear. I
25 just didn't feel the need -- I could go through the specific

1 allegations. But it is not nearly as cut and dried as the
2 government would make one believe.

3 I also would like to just address just generally the
4 concept of the defendant somehow making his way to some third
5 country that doesn't have extradition. I would note both the
6 Cayman Islands and Mexico, for what it's worth, do have
7 extradition treaties with the United States. Mexico has its
8 own. The Cayman Islands is covered by the United Kingdom
9 extradition treaty. So I just want your Honor to understand
10 that.

11 Beyond that, though, your Honor, there is this idea
12 where the defendant would just somehow leave the country and
13 then all of a sudden relocate to yet another country and live
14 out his remaining days. That sound the like some sort of a spy
15 movie. Mr. Gaffey is a 74-year-old grandfather who has never
16 lived a day outside the United States. He's on medication for
17 hypertension, prediabetes, and various other issues. All of
18 his family is here. All his support is here. He is not a
19 particularly wealthy man by the -- I don't know, by any
20 standards. He was a CPA for his life and not at some massive
21 accounting firm. So the idea that he's going to use this
22 knowledge that he's gained, which is hardly unique in his field
23 or a lot of other fields, and somehow pick up stakes and live
24 for the rest of his life, it's easy to say, your Honor. It's
25 impossible to do. In my experience --

1 THE COURT: Would he put up his real property?

2 MR. BUEHLER: Your Honor, he's not here. I can check
3 with him. I know he would have some very good co-signers. And
4 that would be a quicker --

5 THE COURT: No. I mean the real property.

6 MR. BUEHLER: Yes. I would have to check. I would
7 have to check with him, your Honor. I don't know. But I
8 will -- I can do that, your Honor.

9 With regard to the issues that your Honor raised about
10 the production, that's not the position of the defense, your
11 Honor. The government is basically again kind of looking at it
12 from an extremely one-sided perspective. The fact of the
13 matter is, I would note just right off the bat the issue about
14 the subpoena, which, you know, the government says, well, the
15 defense is engaging in a very technical explanation here. That
16 was the subpoena that was issued by the government. OK. There
17 are a lot of ways you can ask for these kinds of documents.
18 They used a defined term. We used that definition. In our
19 response to the government, we even cited the specific terms
20 and the specific segments of the Federal Register, the
21 regulations that we are referring to. And the lawyer from the
22 Tax Division to whom that letter was submitted, with whom we
23 had been in touch, did not object at the time, never came back
24 to us and said such documents exist. And we continue to submit
25 that under the terms of that subpoena that was fully complied

1 with.

2 THE COURT: There's no way we're going to ultimately
3 resolve those issues now. I hear the arguments for both sides.

4 So if you give me a couple minutes, I'll give you a
5 suggestion or two.

6 (Recess)

7 THE COURT: Hold on for just one second.

8 Counsel, the trip to Mexico, is it just the Gaffeys?
9 Are they going with anybody else?

10 MR. BUEHLER: No, your Honor. The first trip to
11 Mexico was just Mr. Gaffey and his wife.

12 THE COURT: OK. I've heard now both sides and read
13 your submissions, and the thrust is that the defense is seeking
14 modification of the existing bail conditions to allow
15 Mr. Gaffey to travel out of the country. I think that the
16 government has demonstrated that there is a risk of flight by a
17 preponderance of the evidence, unless, in my opinion, he puts
18 up real assets as a condition of taking that trip, namely the
19 two houses that he owns, his primary residence and his weekend
20 residence. So if he were willing to do that, I would authorize
21 him making the first trip only at this time, and when he comes
22 back we can consider the second trip separately. So if you let
23 me know, counsel, if he's willing to do that, then, as I say, I
24 would allow him to take that trip, as it's described by defense
25 counsel in defense counsel's letter of January 8, 2019.

1 OK? So I'll hear from you, I suppose, one way or the
2 other. Thanks.

3 MR. BUEHLER: Thank you, your Honor. We'll be back in
4 touch with the Court.

5 THE COURT: All right.

6 MR. REHN: Thank you, your Honor.

7 MR. PARKER: Thank you, your Honor.

8 THE COURT: You bet. Nice to see you.

9 (Adjourned)